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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 United States of America, ) CR 08-954-PHX-JAT  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 )  
13 Marlon Rubio, )  
14 Defendant. )  
15

16 Pending before the Court is Defendant's Motion to Exclude Statements of Material  
17 Witnesses (Doc. #104). Defendant requests that the hearsay statements of the material  
18 witnesses be excluded from trial. Further, Defendant requests in the alternative, that the  
19 testimony only be used as to Count 4 of the Superseding Indictment (Doc. #60), and an order  
20 severing the trial on Count 4 from the trial on Counts 1-3. The Government argues  
21 Defendant's Motion should be denied because Defendant knowingly and intelligently  
22 stipulated to the admission of these statements at trial. For the following reasons, the Motion  
23 will be denied on both requests.

24 **I. Factual Background**

25 On July 21, 2008, Defendant was charged with Harboring Illegal Aliens for Financial  
26 Gain in violation of Title 8, United States Code, Section 1324(a)(1)(A)(iii) ("Harboring  
27 Illegal Aliens"). (Complaint, Doc. #1.) Following this complaint, Defendant was provided  
28 with a statement of probable cause that set forth material witnesses' allegations, the agents'

1 first Report of Investigation which summarized the agents' interviews with the three material  
 2 witnesses, and the agents' third Report of Investigation which provided further detail from  
 3 one of the interviews. (Government's Response to Defendant's Motion to Exclude  
 4 Statements of Material Witnesses, Doc. #116, p. 3-4.)

5 On July 30, 2008, the Government extended a plea agreement to Defendant. (Doc.  
 6 #116, Exh. B, p. 1.) The plea agreement called for a guilty plea to the charge of Possessing,  
 7 Using, Carrying a Firearm During and in Relation to a Crime of Violence in violation of Title  
 8 18 U.S.C. § 924(c) ("Possession of a Firearm"). (*Id.*) Specifically, the plea agreement  
 9 contained a provision in which the Government agreed, in exchange for a plea of guilty, not  
 10 to prosecute Defendant for the crimes of Hostage Taking in violation of 18 U.S.C. § 1203  
 11 ("Hostage Taking"), and Harboring Illegal Aliens. (*Id.* at 3.)

12 On August 20, 2008, the date in which the video depositions of the three material  
 13 witnesses were scheduled to take place, Defendant signed and filed a document entitled  
 14 "Stipulation and Joint Motion for Release of Material Witnesses." (Motion for Release from  
 15 Custody, Doc. #34.) Based on these stipulations, the material witnesses were excused  
 16 without submitting to a deposition. (*Id.* at 2.) That same day Defendant was indicted for  
 17 Harboring Illegal Aliens. (Indictment, Doc. #29.) Subsequently, on November 6, 2008, the  
 18 Government filed a superseding indictment adding the charges of Possession of a Firearm  
 19 and Aiding and Abetting in violation of 18 U.S.C. § 1202 ("Aiding and Abetting"), Hostage  
 20 Taking and Aiding and Abetting, and Conspiracy to Commit Hostage Taking in violation of  
 21 18 U.S.C. § 1203 ("Conspiracy to Commit Hostage Taking"). (Superseding Indictment, Doc.  
 22 #60.)

## 23 **II. Exclusion of Statements of Material Witnesses**

### 24 **A. Standard**

25 The right to confront witnesses in a criminal matter is a fundamental right under the  
 26 Sixth Amendment. U.S. CONST. amend. VI. The accused may waive this right. *See United*  
 27 *States v. Mezzanatto*, 513 U.S. 196, 201 (1995). The Government must establish by clear and  
 28 convincing evidence that the waiver was voluntary, knowing, and intelligent. *Schell v. Witek*,

1 218 F.3d 1017, 1023 (9th Cir. 2000); *United States v. Marotta*, 518 F.2d 681, 684 (9th Cir.  
2 1975) (“[T]he government always has the burden of proving that a defendant knowingly  
3 waived his constitutional rights.”). A defendant’s attorney may waive the right to confront  
4 witnesses as a trial strategy. *Wilson v. Gray*, 345 F.2d 282, 286 (9th Cir. 1965). If a  
5 stipulation in a criminal trial is entered into freely and voluntarily it is binding and  
6 enforceable; thus “a defendant who has stipulated to the admission of evidence cannot later  
7 complain about its admissibility.” *United States v. Technic Services, Inc.*, 314 F.3d 1031,  
8 1045 (9th Cir. 2002). The stipulation should be interpreted as to carry out the intentions of  
9 the parties. *United States v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996).

#### 10 **B. Analysis**

11 Defendant argues that the stipulation to admit the statements of the material witnesses  
12 was not given knowingly and intelligently, and thus violates his Sixth Amendment right to  
13 confront the witnesses against him. (Motion to Exclude Statements of Material Witnesses,  
14 Doc. #104, p. 3-4.) Defendant believes his waiver was not given knowingly and intelligently  
15 because he was unaware these statements would be used for any purpose other than the  
16 charge of Harboring Illegal Aliens. (*Id.*) The Government argues that Defendant had  
17 knowledge that the Government intended to prosecute him for Hostage Taking and  
18 Possession of a Firearm. (Doc. #116, p. 9-10)

19 The record shows that the charges of Possession of a Firearm and Hostage Taking  
20 were issues addressed in the proposed plea agreement. The plea agreement called for the  
21 Defendant to pled guilty to the charge of Possession of a Firearm, and at that time made the  
22 Defendant aware that this was a possible charge. Additionally, the plea agreement contained  
23 a provision in which the Government agreed not to charge Defendant with the charge of  
24 Hostage Taking, and therefore also put Defendant on notice of this charge. This plea  
25 agreement was provided to Defendant on July 30, 2008, nearly one month before the  
26 stipulation to release the witnesses took place on August 20, 2008.

27 Also, as pointed out in oral argument, some of the facts stipulated to are facts that  
28 relate directly to charges of Possession of a Firearm and Hostage Taking, such as “Material

1 witnesses...were verbally and physically threatened with physical injury through the use and  
2 possession and carrying of firearms by the defendant[]...Marlon Alexander Rubio in order  
3 to compel others to pay money.” (Doc. #34, p. 2.) The fact that the Government wanted  
4 hearsay statements to be admissible at trial that could be used for a Possession of a Firearm  
5 charge and a Hostage Taking charge further alerted Defendant to the Government’s  
6 intentions.<sup>1</sup> Accordingly, these potential charges were known to Defendant before he signed  
7 the stipulation.

8 Further, looking at the intent of the parties to the stipulation, the stipulation is not  
9 limited in scope to the charge of Harboring Illegal Aliens. The language of the stipulation  
10 specifies that it applies to any statements in the disclosure and “shall be admitted as  
11 substantive evidence in any hearing or trial in the above-encaptioned matter.” (Doc. #34, p.  
12 1.) The superseding charges do not fall outside of a hearing or trial in this matter. As was  
13 noted above, Defendant had knowledge that the superseding charges were possible before  
14 he entered into the stipulation. Thus, the Court finds that the broad language of the  
15 stipulation, which is not charge specific, encompasses these additional charges. *See Petty*,  
16 80 F.3d at 1387 (“The factual basis for this claim obviously existed before the parties’  
17 stipulation...[h]ence, it is reasonable to treat this claim as falling within the scope of the  
18 waiver.”). Therefore, the Court finds Defendant knowingly and intelligently entered into the  
19 stipulation.

20 Considering the foregoing, the Defendant’s Rule 15 argument also fails. The  
21 Defendant notes that Rule 15 of the Federal Rules of Criminal Procedure limits deposition  
22 examinations to the scope and manner of material that would be allowed during trial. Thus,  
23 he argues the examination of issues outside of Harboring Illegal Aliens would have been  
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25 <sup>1</sup> Additionally, a transcript of the August 20, 2008 hearing wherein Defendant entered  
26 into the stipulation was admitted into evidence at the April 21, 2009 hearing on this motion.  
27 After reviewing the transcript, it is clear that Judge Anderson discussed the scope and  
28 consequences of entering the stipulation with Defendant to ensure he waived his rights  
knowingly, intelligently, and voluntarily. (Defendant’s Exh. 11.)

improper if a deposition had taken place. Defendant contends that following this logic any stipulated statements that would not have been relevant to Harboring Illegal Aliens should not be admissible at trial. However, this Court rejects this argument based on the same reasons listed above. Defendant had notice of the potential additional charges and knowingly entered into the broad language of the stipulation; thus, he is bound by this stipulation. *See Hawkins v. Hannigan*, 979 F.Supp. 1397, 1405 (D. Kan. 1997) (“The fact that the scope of the information provided through the stipulated agreement may have exceeded that anticipated by petitioner does not...render petitioner’s waiver invalid.”). Accordingly, Defendant’s waiver of his right to confront the material witnesses was valid.

### **III. Permitting Material Witness Testimony only with Regard to Count 4 and an Order Severing for Trial Count 4 from Counts 1-3**

#### **A. Standard**

This Court has discretion to sever under Rule 14(a) and the Court’s discretion shall be upheld unless a “joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial.” *United States v. Sarkisian*, 197 F.3d 966, 975 (9<sup>th</sup> Cir. 1999) (internal quotation omitted). Defendant bears “the burden of proving that the joint trial was manifestly prejudicial.” *United States v. Lewis*, 787 F.2d 1318, 1321 (9<sup>th</sup> Cir. 1986).

“[T]here is ‘a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.’” *Id.* at 1322 (quoting *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985)). However, “with respect to the practice of trying separate counts together in one trial, ‘if all the evidence of [a] separate count would be admissible upon severance, prejudice is not heightened by joinder.’” *United States v. Quinn*, 18 F.3d 1461, 1466 (9<sup>th</sup> Cir. 1994) (quoting *United States v. Johnson*, 820 F.2d 1065, 1070. (9<sup>th</sup> Cir. 1987)).

1                    **B.      Discussion**

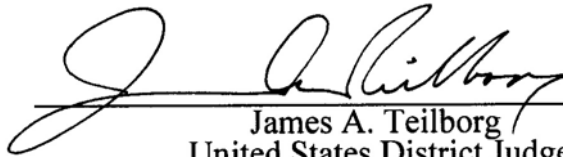
2            Defendant argues, in an alternative, that if this Court finds the stipulation to be valid,  
3 then the statements therein should be limited to Count 4 of the Superseding Indictment.  
4 Accordingly, Defendant moves to sever the trial on Count 4 from the trial on Counts 1-3.  
5 (Doc. #104, p. 1.)

6            This Court has found that the language of the stipulation encompasses all the charges,  
7 in the superseding indictment; thus this stipulation is binding for all of the Counts of the  
8 Superseding Indictment. Therefore, this Court will not limit the admission of the material  
9 witnesses' hearsay statements to only Count 4. Accordingly, because the evidence is  
10 admissible as to each count, prejudice is not heightened by the joinder. As a result,  
11 Defendant has failed to establish that the joinder of these counts is manifestly prejudicial.  
12 Further, no argument has been presented to support a severance of the Counts if the material  
13 witnesses' statements are admissible on to all counts. Therefore, this Court denies  
14 Defendant's request to limit the stipulation and sever Count 4 from Counts 1-3 at trial.

15            Based on the foregoing,

16            **IT IS ORDERED** denying the Defendant's Motion to Exclude Statements of Material  
17 Witnesses (Doc. #104).

18            DATED this 27<sup>th</sup> day of April, 2009.

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22                    James A. Teilborg  
23                    United States District Judge  
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